IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-2328

UNITED STATES,

Plaintiff-Appellee,

v.

DTE ENERGY CO.

Defendant-Appellant.

On Appeal From The U.S. District Court For The Eastern District Of Michigan, No. 10-13101 (Hon. Bernard A. Friedman).

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GLOSSARY

EPA	U.S. Environmental Protection Agency
MDEQ	Michigan Department of Environmental Quality
NSR	New Source Review
BACT	Best Available Control Technology
SIP	State Implementation Plan
PSD	Prevention of Significant Deterioration
NO_x	Nitrogen Oxides
SO_2	Sulfur Dioxide
CAA	Clean Air Act
DTE	DTE Energy Co., parent of Detroit Edison
ESGU	Electrical Steam Generating Unit (i.e. a power plant)
UARG	Utilities Air Regulatory Group (a power plant trade association that includes Detroit Edison)
TSD	Technical Support Document

CLEAN AIR ACT CODIFICATION GUIDE

Clean Air Act Section	**Codified at:**
§ 111 - Definitions	42 U.S.C. § 7411
§ 113 - Federal Enforcement	42 U.S.C. § 7413
§ 165 - Preconstruction Requirements (PSD program)	42 U.S.C. § 7475
§ 167 - Enforcement (PSD-specific)	42 U.S.C. § 7477
§ 169 - Definitions (PSD-specific)	42 U.S.C. § 7479
§ 304 - Citizen Suits	42 U.S.C. § 7604

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INTRODUCTION

The Parties agree: New Source Review ("NSR") is a pre-construction permitting program. Def. Br. at 2. The question is whether the pre-construction aspect of NSR has any meaning.

Detroit Edison asks this Court to conclude that Congress created a pre-construction permitting program that now depends exclusively on post-construction pollution data. Def. Br. at 31. According to Detroit Edison, source operators can bypass pre-construction permitting at their discretion with no recourse for EPA until pollution actually increases. Def. Br. at 22. In the company's eyes, a handful of sentences from a 2002 rulemaking record revolutionized NSR.

Detroit Edison is wrong. Nothing in the record suggests that EPA intended such a revolution. To the contrary, EPA specifically stated that, for electric utilities like Detroit Edison, the 2002 rules made only "minor changes." 67 Fed. Reg. 80,186, 80,192 (Dec. 31, 2002). Once the Court looks beyond the *three sentences* from the rules that Detroit Edison repeatedly cites, the regulations make clear that enforceable, pre-construction review remains a central element

of NSR. *See, e.g.*, 40 C.F.R. § 52.21(a)(2)(iv)(*a*), (b)(2) (NSR applies to construction that "*would result in*" pollution increases). Projects that trigger NSR must obtain permits and install pollution controls (among other requirements) before beginning construction. *See, e.g.*, *Nat'l Parks Conservation Ass'n v. TVA*, 480 F.3d 410, 412-13 (6th Cir. 2007) ("*NPCA*"). That is how NSR worked for two decades before the 2002 Rules, and how EPA intended it to work afterwards.[1]

That pre-construction focus makes perfect sense: Congress required pre-project analysis in order to control pollution. 42 U.S.C. §§ 7401, 7470. Congress also specified that EPA can enforce NSR applicability based on pre-construction information. 42 U.S.C. § 7477. The dedicated enforcement provision shows that enforceable, pre-construction review is *required* by statute; Congress expected EPA to review and challenge companies' faulty pre-construction NSR applicability determinations. Allowing operators to circumvent NSR

[1] While NSR applicability is generally established before construction, source obligations to operate pollution controls and comply with NSR continue after construction. *See* 42 U.S.C. § 7475; *NPCA*, 480 F.3d at 418-19. In addition, sources can trigger NSR if pollution increases after construction. Pl. Br. at 31.

based on their own unreviewable determinations thwarts the purpose of NSR and contradicts the language of the statute and rules.

The facts here illustrate the stakes: The night before beginning a $65 million overhaul at Monroe Unit #2, Detroit Edison sent state regulators an analysis predicting pollution increases 100 times larger than required for NSR applicability. The company claimed to be exempt from NSR for certain *purely legal* reasons unrelated to the issues on appeal. Now it says that – even though it told regulators the project would increase emissions, and no matter how unreasonable its analysis of the legal issues was – only post-project pollution data can trigger the permitting and pollution control requirements of NSR. Meanwhile, the company puts off installing pollution controls that would sharply decrease emissions and save nearly 100 lives per year by reducing air pollution downwind of the plant.

ARGUMENT

Despite the novel claims in its brief, Detroit Edison agrees that NSR[2] is a pre-construction permitting program. Def. Br. at 2. It also agrees that – for the first two decades of the program – EPA had the authority to enforce NSR requirements by reviewing operators' pre-construction applicability determinations. Def. Br. at 2-3, 11. In other words, EPA could require NSR pollution controls *after* construction if the operator should have determined *before* construction that NSR applied.

Detroit Edison asks this Court to hold that EPA discarded that approach in 2002, and that its new regulations preclude EPA from *ever* challenging operators' pre-construction applicability analyses.[3] Detroit Edison's argument contradicts the text of the Act and its rules – and the common sense application of this critical air quality program.

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[2] This brief uses NSR to refer to both the Nonattainment New Source Review and the Prevention of Significant Deterioration ("PSD") programs. The programs are generally parallel. In citing specific provisions, this brief refers to PSD.

[3] The Clean Air Act applies to owners and operators. We use operators for brevity.

I. THE 2002 RULES DID NOT CHANGE EPA'S ENFORCEMENT AUTHORITY

A. Nothing In The Rulemaking Record Limits EPA's Enforcement Authority

Before this Court, Detroit Edison relies almost exclusively on three sentences from Subsection 52.21(a)(2)(iv).[4] *See, e.g.*, Def. Br. at 27-28. The company contends that those three sentences upended everything that went before: the statute itself, the rest of the regulation, case law, and decades of NSR practice – all of which make clear that EPA can enforce NSR based on the pollution an operator should have expected to result from construction. The company's novel argument was first offered in this litigation, seven years after the rules took effect. The language of the rules and EPA's contemporaneous explanation demonstrate that pre-construction emissions analyses remain enforceable, as they had been for more than two decades.

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[4] Before the district court, Detroit Edison emphasized the recordkeeping requirements of 40 C.F.R. § 52.21(r)(6) as the operative change in the 2002 Rules. *See, e.g.*, Dkt. #107 at 15-17. The district court followed Detroit Edison's lead. Dkt. #160 at 6-7, 8-9. After our opening brief pointed out the flaws in relying on 40 C.F.R. § 52.21(r)(6), Pl. Br. at 35-46, Detroit Edison now emphasizes 40 C.F.R. § 52.21(a)(2)(iv) instead.

1. The plain text of Subsection 52.21(a)(2)(iv) refutes Detroit Edison's argument.

Detroit Edison's argument relies on surgically extracting three sentences from Subsection 52.21(a)(2)(iv)(*a*)-(*b*), while ignoring the rest of the regulation. Detroit Edison's oft-cited sentences simply do not mean what the company wishes, and no amount of bold italics can change that. Looking at the rules in their entirety shows that they do not change EPA's pre-construction enforcement authority.

Detroit Edison never provides a full quotation from Subsection 52.21(a)(2)(iv)(*a*)-(*b*). The provisions read as follows (with bold italics for language critical to the meaning of the provisions and never cited by Detroit Edison):

> • 40 C.F.R. § 52.21(a)(2)(iv)(*a*): Except as otherwise provided in paragraphs (a)(2)(v) and (vi) of this section, ***and consistent with the definition of major modification contained in paragraph (b)(2) of this section***, a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases--a significant emissions increase (***as defined in paragraph (b)(40) of this section***), and a significant net emissions increase (***as defined in paragraphs (b)(3) and (b)(23) of this section***). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

> • 40 C.F.R. § 52.21(a)(2)(iv)(*b*): ***The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e., the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(2)(iv)(c) through (f) of this section. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (i.e., the second step of the process) is contained in the definition in paragraph (b)(3) of this section.*** Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

The purpose of Subsection 52.21(a)(2)(iv)(*a*) is simply to stress that there are two types of emissions calculations and both must show increases for a project to trigger NSR. Pl. Br. at 52-54. The cross references that Detroit Edison consistently omits explain how those emissions increases are calculated: based on projected emissions before beginning the work. Pl. Br. at 53-54. For example, the provision states that applicability must be determined "*consistent with the definition of major modification* contained in paragraph (b)(2)." 40 C.F.R. § 52.21(a)(2)(iv)(*a*) (emphasis added). That definition – also ignored by Detroit Edison's brief – covers projects that "*would result in*" pollution increases. *Id.* § 52.21(b)(2) (emphasis added). Similarly, by

cross referencing to Subsection 52.21(b)(3), the regulation calls for existing sources to determine applicability based on the "Actual-to-projected-actual applicability test." 40 C.F.R. § 52.21(b)(3) (referencing 40 C.F.R. § 52.21(a)(2)(iv)(*c*)). By incorporating the projection-based language of Subsections 52.21(a)(2)(iv)(*c*) and 52.21(b)(2), EPA demonstrates that the regulation retains pre-construction projections as the touchstone. The language Detroit Edison plucks from Subsection 52.21(a)(2)(iv)(*a*) must be construed to be consistent with the operative provisions it references. But Detroit Edison never attempts to explain the explicit incorporation of the major modification definition in the provision that it relies upon so heavily.

Similarly, our opening brief showed the flaw in Detroit Edison's reading of Subsection 52.21(a)(2)(iv)(*b*), also relied upon by the district court (Dkt. #160 at 5). Pl. Br. at 50-52. When examined as a whole, the provision stresses that emissions calculations must be performed "before beginning actual construction" to determine whether a pollution increase "will occur." 40 C.F.R. § 52.21(a)(2)(iv)(*b*). The sentence Detroit Edison highlights merely clarifies that if the pre-construction analyses show no increase, a source is liable if post-construction

pollution increases. Pl. Br. at 31. Detroit Edison never explains why the rest of the language can be ignored. The provision also specifically references Subsection 52.21(a)(2)(iv)(*c*) as setting forth the method for determining applicability based on the "Actual-to-projected-actual applicability test." Again, the surrounding language and cross references render Detroit Edison's reading of Subsection 52.21(a)(2)(iv) untenable.

The three sentences Detroit Edison carved out from the rules cannot and did not reconstruct the entire NSR program. Detroit Edison's position effectively nullifies the rest of Subsection 52.21(a)(2)(iv): if only actual post-construction pollution matters, there would be little point in requiring sources to engage in the projections required by 52.21(a)(2)(iv)(*b*)-(*f*). Indeed, the rules are replete with provisions that make sense only where pre-construction projections control applicability, such as the detailed, specific provisions for calculating "projected actual emissions," under which a proposed modification triggers NSR if it is *predicted to cause* an increase in future emissions. 40 C.F.R. § 52.21(b)(41)(ii). Such reticulated provisions make no sense if the pre-construction analysis is

unreviewable. The rules also require certain sources to submit their pre-construction analyses to the permitting authority – something that is pure waste in the company's view of NSR, since those pre-construction analyses cannot result in applicability. Detroit Edison never explains why EPA would expand pre-construction recordkeeping and monitoring while eliminating pre-construction review. *See* Pl. Br. at 41-42.

2. EPA's rulemaking materials demonstrate that Subsection 52.21(a)(2)(iv) did not change NSR enforcement.

Detroit Edison's novel reading of the regulations in this litigation squarely conflicts with EPA's interpretation when EPA created the rule.

In the preamble to the final rules, EPA "summarize[d]" the applicable provisions for determining whether different types of projects were modifications. 67 Fed. Reg. at 80,190. In describing the "major new changes to NSR applicability," that summary did *not* include any mention of an emissions test based on post-construction actual data. *Id.* Instead, it stated that existing units use an "actual-to-projected-actual applicability test" – i.e., a pre-construction applicability analysis based on projected pollution. *Id.* The preamble

also summarized the five changes made in the 2002 Rules, while saying nothing about changing the Agency's enforcement authority. *Id.*; *see also* Pl. Br. at 44-46. Nor did EPA announce any potential changes to enforceable, pre-construction review in the1996 and 1998 notices of proposed rulemaking for the changes ultimately adopted in 2002. *See* 61 Fed. Reg. 38,250 (July 23, 1996); 63 Fed. Reg. 39,857 (July 24, 1998); 67 Fed. Reg. at 80,187 (noting publication of proposed rules). Had the Agency intended such a change, it would have explained it on the record rather than slipping it into the rules without comment. *See Kooritzky v. Reich*, 17 F.3d 1509, 1512 (D.C. Cir. 1994) (notice of proposed rule must provide "'either the terms or substance of the proposed rule or a description of the subjects and issues involved'") (quoting 5 U.S.C. § 553(b)(3)).[5] Notably, Detroit Edison cites nothing from the preamble or the proposed rules that presaged what it claims EPA did in the 2002 Rules.

In fact, the 2002 Rules explanatory materials specifically disclaimed any transformative effect for Subsection 52.21(a)(2)(iv) –

[5] The Clean Air Act has its own statutory analog to 5 U.S.C. § 553(b) at 42 U.S.C. § 7607(d)(3). The standards are treated similarly. *Ne. Md. Waste Disposal Auth. v. E.P.A.*, 358 F.3d 936, 950-51 (D.C. Cir. 2004).

the provision Detroit Edison relies upon. It was merely a "clarifying change" made in response to commenters who found prior descriptions of the applicability tests "confusing." EPA Technical Support Document (Nov. 2002) ("TSD") at I-4-28, *available at* http://www.epa.gov/airquality/nsr/documents/nsr-tsd_11-22-02.pdf. The subsection provided – in a single place – the relevant procedures to determine applicability in various scenarios, while pointing to the substantive provisions that controlled each scenario. 67 Fed. Reg. at 80,190; TSD at I-4-28. As described above in Section I.A.1, the subsection repeatedly references the operative and forward-looking provisions elsewhere in the rule – such as the cross-reference to the major modification definition discussed above. EPA explained at the time that Subsection 52.21(a)(2)(iv) is a "roadmap" to the relevant standards – not a rewrite. 67 Fed. Reg. at 80,190; TSD at I-4-28.

In the 2002 Rules Technical Support Document, EPA further emphasized that enforceable pre-construction review remained a central element of NSR:

> *The NSR program remains a pre-construction review program.* To ensure a level playing field between sources that may approach the pre-construction projection of post-change emissions with different degrees of

> conscientiousness, *monitoring the quality of pre-construction projections is important*.

TSD at I-4-41 (emphasis added). The reference to "monitoring the quality of pre-construction projections" is critical here: it includes enforcement based on pre-construction projections. EPA made clear in several places that nothing in the 2002 Rules restricted its enforcement authority:

- "[T]he projection of post-change emissions alone is sufficiently reliable *and enforceable*." TSD at 1-4-7 (emphasis added).
- "There are no provisions in the final rules to protect from civil or criminal penalties the owner or operator of a source that constructs a 'major modification' without obtaining a major NSR permit." *Id.* at I-4-26.
- "*EPA did not alter any of the mechanisms provided by the CAA to take enforcement action against sources that improperly determined that NSR does not apply*." Brief for Respondent U.S. EPA, *New York v. EPA*, No. 02-1387, 2004 WL 5846388, at *98 (D.C. Cir. Oct. 26, 2004) (emphasis added).

Notably, Detroit Edison cites nothing in the materials supporting the 2002 Rules to suggest that EPA cannot review a source's pre-construction emissions analysis. Instead, the company's support establishes only that post-project pollution data can serve as a supplemental basis for NSR applicability. For instance, Detroit Edison

claims the Technical Support Document stated that a project triggers NSR only when post-change pollution increases. Def. Br. at 4-5 (quoting TSD at I-4-29). Again, Detroit Edison ignores the immediately preceding sentence. There EPA described the issue it was responding to: "We understand the commenters' concerns about proposed rule language suggesting that any post-change emissions increase, rather than a significant emissions increase, at a modified emissions unit would trigger NSR." TSD at I-4-28-29. The context makes clear that EPA simply confirmed that only pollution increases of a certain magnitude trigger NSR applicability based on post-project data. TSD I-4-28–29. Moreover, EPA would not, and could not, hide a major shift in NSR within its responses to comments.

Finally, the pervasive pre-construction orientation of NSR informs how the Court should read the language of the rules. *Baptist Physician Hosp. Org., Inc. v. Humana Military Healthcare Servs., Inc.*, 481 F.3d 337, 344 (6th Cir. 2007) (importance of "reading the regulation in its entirety to glean its meaning.") (quoted in Def. Br. at 35); *see also Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("The meaning—or

ambiguity—of certain words or phrases may only become evident when placed in context."). Detroit Edison relies almost entirely on the notion that isolated instances of present tense verbs like "causes" and "results" show unequivocally that EPA intended for post-project data to control. But in the context of NSR – and its bedrock pre-construction framework – these verb tenses show no such thing. For example, in 2002 Rules preamble, EPA uses the heading "Determining Whether a *Proposed* Modification *Results* in a Significant Emissions Increase." 67 Fed. Reg. at 80,189 (emphasis added). EPA's use of the word "proposed" shows that it is describing a pre-construction analysis of a future project – yet it uses a present tense verb. Juxtaposing "proposed" with "results" shows that the verb tenses Detroit Edison puts so much stock in reflect pre-construction analysis in this context.

3. Detroit Edison's interpretation of Subsection 52.21(a)(2)(iv) contradicts its own description of NSR.

Detroit Edison cannot reconcile its interpretation of Subsection 51.21(a)(2)(iv) with its vision of how NSR works. Detroit Edison argues that the three sentences it plucked from Subsection 52.21(a)(2)(iv) mean that actual, post-project pollution data exclusively controls

whether NSR applies. As the company says, Subsection 52.21(a)(2)(iv)(*b*) "applies expansively to 'any such' projection, whether it is the actual projection performed by the operator or" an EPA projection. Def. Br. at 22; *see also id.* at 31 ("Preconstruction projections are not determinative of whether a major modification has occurred."). By that reading, sources would *never* need to get permits based on pre-construction analyses.

Just a few pages earlier, however, Detroit Edison states that when *sources* project an emissions increase "as always, the operator must get a permit." Def. Br. at 18-19. If so, then the company's interpretation of the three extracted sentences from Subsection 52.21(a)(2)(iv) *cannot* be correct. On pages 18-19, Detroit Edison says the rules require operators to obtain pre-construction permits in certain circumstances. But a few pages later, the company says the rules mean that an operator *never* has to get a pre-construction permit. The claims cannot coexist. Either:

- pre-construction permits are never required and the statutory and regulatory pre-construction requirements are rendered inoperative, Def. Br. at 22, *or*

- pre-construction permits are required some of the time, contradicting the company's reading of Subsection 52.21(a)(2)(iv). Def. Br. at 18-19.

By attempting to twist the rules to its desired conclusion, Detroit Edison is left contradicting itself. In the end, Detroit Edison's argument is internally inconsistent. That inconsistency need not exist, however, because the three sentences do not preclude liability based on emissions projections. Instead, sources can trigger NSR based on pre-construction analyses *or* post-construction pollution data. Pl. Br. at 26-31.

4. The 2002 Rules did not respond to decisions in NSR enforcement cases.

Without support in the text of the rules or preamble, Detroit Edison attempts to craft a narrative in which EPA changed the rules in 2002 to rein in the Agency's own enforcement efforts. This claim is neither true nor relevant. First, the cases Detroit Edison cites all post-date the 2002 Rules. *See* Def. Br. at 11-14. EPA could not have been responding to them when it proposed the changes in 1996 and 1998 or finalized them in 2002. Second, the substantive dispute reflected in the case cited by the company, *United States v. Alabama*

Power Company, 372 F. Supp. 2d 1283 (N.D. Ala. 2005), involved the routine maintenance exemption to NSR, a provision completely unrelated to both the revisions made in 2002 and the issues before this Court. Third, the reference in *United States v. Ohio Edison Company* to an "abysmal breakdown" came as the court chastised EPA for taking too long to bring an enforcement action *based on pre-construction analysis*. 276 F. Supp. 2d 829, 832 (S.D. Ohio 2003). The court ultimately accepted EPA's theory of liability and ruled for the government. *Id.* at 889-90. Finally, it makes no sense to suggest that EPA amended its rules in order to rein in its own enforcement efforts as the Agency could have done so without rulemaking.

5. Detroit Edison's delay in raising its argument demonstrates that it is not based on a plain reading.

Finally, Detroit Edison's actions in this litigation belie its plain language argument.[6] The United States filed its complaint in this case on August 5, 2010, and moved for a preliminary injunction the

[6] Detroit Edison *must* argue that its interpretation is "*compelled* by the regulation's *plain language* or by other indications of [the agency's] intent," otherwise the Court is required to defer to EPA's interpretation. *See* Def. Br. at 56 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)) (emphasis added).

next day. Pl. Br. at 17. Detroit Edison responded with a 36-page brief supported by declarations from seven hired experts. Dkt. #46. The Parties proceeded to a preliminary injunction hearing on January 19, 2011, where the trial court denied the motion but set an expedited discovery schedule and scheduled trial for May 11, 2011 (later moved to September 12, 2011). Detroit Edison never argued that the lack of post-project pollution data precluded the district court from finding a violation.

Only *after* completing document discovery and serving expert reports did Detroit Edison move on June 9, 2011 for summary judgment. After 10 months of litigation, the company argued for the first time – based on the rule language that it *now* claims is "clear and unambiguous" – that EPA can only enforce NSR based on an actual, post-construction pollution increase. *See, e.g.*, Def. Br. at 28. If true, such language would have been grounds for dismissal of the case from the very beginning of this litigation. If the rules unambiguously precluded EPA enforcement, Detroit Edison's expert NSR lawyers would not have needed 10 months of exhaustive, expensive litigation to realize it.

B. Detroit Edison's Trade Group Affirmed EPA's Interpretation

The company concedes supporting the UARG brief that defended the 2002 Rules before the D.C. Circuit ("UARG Brief"). Def. Br. at 42-43. It now claims that the brief meant something different than the plain language would suggest: that it referred only to EPA information-gathering authorities – and not enforcement itself – when it discussed "enforcement tools and opportunities" and "enforcement capabilities." *See* Def. Br. at 42.[7]

The language of the UARG Brief leaves little doubt that it was reassuring the D.C. Circuit that EPA enforcement authority was not diminished by the 2002 Rules. The heading for the relevant section of the brief mirrors the United States' argument here: "The Actual-to-Projected Actual Applicability Test Is Enforceable." Joint Brief of Industry Intervenors, *New York v. EPA*, No. 02-1387, 2004 WL 5846442, at *16 (D.C. Cir. Oct. 26, 2004). UARG went on to say:

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[7] Prospective *amici* make a similar argument about the meaning of the UARG Brief. Brief of *Amici Curiae* in Support of Defendants-Appellees, *United States v. DTE Energy Co.*, No. 11-2328 (6th Cir. May 8, 2012) at 23-25. For the reasons described in the text, that argument is refuted by the language of the UARG Brief.

- "The basic approach to enforcing NSR requirements under the [2002] final rules is similar to the approach that existed previously. . . If the source's [pre-construction] determination ultimately turns out to be incorrect in the view of EPA or a state agency, the source may be subject to enforcement for violating NSR."
- Noting "many opportunities that EPA and states have to ascertain whether a particular project *will* trigger . . . NSR requirements."

UARG Brief at *18-*19 (emphasis added). The message was clear: the 2002 Rules did not change EPA's enforcement capabilities, explicitly including the ability to evaluate "whether a particular project will trigger" NSR based on predicted pollution. *Id.* at *19. As we noted in our initial brief, without response from Detroit Edison, UARG told the D.C. Circuit that the new rules gave EPA "the same or better enforcement capability as compared to the past." Pl. Br. at 47 (quoting UARG Brief at *19).

When UARG compared the 2002 Rules to the preexisting program, the status quo meant enforceable, pre-construction review. UARG explained precisely that to the D.C. Circuit: it cited *Ohio Edison* and the trial court decision in *United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619 (M.D.N.C. 2003), to inform the court that the applicable enforcement case law *required* a comparison of past actual emissions to

projected actual emissions.[8] UARG Brief *at* *7-*8. Contrary to Detroit Edison's claims now, UARG *did* endorse this reality in its description of the existing case law. *Id.; contra* Def. Br. at 43. The enforcement status quo was not in dispute until Detroit Edison's motion below.

Detroit Edison now argues that the 2002 Rules created a paradigm shift in enforcement. The company began its brief to the district court in this litigation by describing pre-2002 enforcement and opining, "The 2002 NSR Reform Rules changed all that." Dkt. # 107 at 1; *see also* Def. Br. at 3 (describing alleged uncertainty in NSR enforcement and stating: "The new rules fix these problems."). Through its trade group, Detroit Edison defended the 2002 Rules by saying they did not change EPA's enforcement options. Now that it is the target of enforcement, Detroit Edison tells this Court that the 2002 Rules changed everything.

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[8] Detroit Edison claims the United States can cite nothing from the rulemaking record to support its position. Def. Br. at 41. This is incorrect. *See* Section I.A.2 *supra*. Strikingly, UARG's *own* brief to the D.C. Circuit demonstrated the understanding among all parties that pre-construction enforcement was the status quo at the time and did not change under the 2002 Rules.

C. The Court Must Defer To EPA's Interpretation Of The Agency's Rules

This Court must defer to EPA's interpretation unless the Agency's views are inconsistent with the regulation. Pl. Br. at 48-50. Detroit Edison concedes the point. *See* Def. Br. at 56. As described at length above, EPA's interpretation is consistent with the language of the regulations.

Detroit Edison also argues that no deference is due here because EPA's reading is merely a "post hoc rationalization" and that the United States' arguments before this Court were rejected by EPA in the record for the 2002 Rules. Def. Br. at 56-57. This claim is simply incorrect. Tellingly, Detroit Edison cites no examples of the United States' arguments here that it claims were rejected in the 2002 rulemaking. To the extent that the company refers to EPA rulemaking statements related to recordkeeping and pollution management, *see* Def. Br. at 49-55, these statements are consistent with EPA's interpretation here because they were made knowing the status quo of enforceable pre-construction review would continue. Detroit Edison assumes its own new reading of the rules is correct and then reads that assumption into EPA's comments. Most important, even on its terms Detroit Edison's

claim applies to only a few EPA statements, not the weight of the United States' argument. *Contra* Def. Br. at 56 ("Virtually every argument . . . is little more than a recycled rulemaking comment that EPA explicitly considered, and rejected"). For example, Detroit Edison cites no EPA statement to rebut the pillars of the United States' argument, such as the requirements of Section 165 and 167, Pl. Br. at 26-32, the language of the rules, Pl. Br. at 50-54, or EPA's contemporaneous statements about the effect of the 2002 Rules, Pl. Br. at 44-46.

EPA's arguments are not post hoc rationalizations undeserving of deference simply because Detroit Edison disagrees with them. The agency's view is grounded in the Clean Air Act, the 2002 Rules, and EPA's contemporaneous supporting materials. The agency's interpretation is entitled to judicial deference.

II. NSR REQUIRES ENFORCEABLE PRE-CONSTRUCTION REVIEW

A. The Statute Mandates Pre-Construction Review And Enforcement

Detroit Edison argues that its radical reinvention of NSR can be reconciled with the requirements of the Clean Air Act. Def. Br. at 43-47. The company believes that an unreviewable applicability analysis by the operator satisfies the pre-construction mandate of the law. The relevant statutory provisions make such an interpretation impossible.

1. The Clean Air Act requires analyses that can only be meaningfully performed before construction.

Tellingly, Detroit Edison *never even attempts* to reconcile its reading with Section 165, 42 U.S.C. § 7475, the heart of the PSD statutory provisions. The company essentially argues that EPA can define modification to apply *solely* to projects showing pollution increases based on post-construction data. Def. Br. at 44. That interpretation renders meaningless several of Section 165's requirements.

The statute requires that, before construction, each source:

- Demonstrate that projected emissions "will not cause, or contribute to, air pollution in excess of" various standards; and
- Analyze "any air quality impacts projected for the area as a result of growth associated with such facility"

42 U.S.C. § 7475(a)(3), (6). These analyses are then part of the public review of the project: an opportunity for the public to provide comments on the proposed construction. 42 U.S.C. § 7475(a)(2). Detroit Edison's reading of the rules nullifies these statutory requirements by allowing operators to avoid NSR until at least one year after construction. This Court has previously explained that "a key purpose of PSD is 'to assure that any decision to permit increased air pollution ... is made only after careful evaluation of all the consequences of such a decision.'" *Nat'l Parks Conservation Ass'n v. TVA*, 480 F.3d 410, 412 (6th Cir. 2007) ("*NPCA*") (quoting 42 U.S.C. § 7470(5)); *see also Puerto Rican Cement Co., Inc. v. EPA*, 889 F.2d 292, 294 (1st Cir. 1989) (Breyer, J.). That "key purpose" cannot be achieved in a post hoc program.

2. The Clean Air Act specifically grants EPA the authority to enforce based on pre-construction analysis.

After ignoring Section 165, Detroit Edison attempts to render Section 167 essentially meaningless. The company's brief argues that, for existing sources like Monroe Unit #2, Section 167 only applies to operators that fail to perform projections at all or comply with the recordkeeping rules.[9] Def. Br. at 45-46. The statute requires more, however. Congress chose to create a special, PSD-specific enforcement provision. This special provision authorizes EPA to *prevent* construction for sources that fail to comply with NSR. 42 U.S.C. § 7477. The provision underscores both pre-construction PSD applicability and EPA's role in determining whether a source has complied with the requirements. *See United States v. Xcel Energy, Inc.*, 759 F. Supp. 2d. 1106, 1113 (D. Minn. 2010) (Section 167 gives EPA "authority to investigate, and then to prevent through appropriate legal remedies, violations committed before construction commences."). Under Detroit Edison's reading, Section 167 would only come into play after a source

[9] Detroit Edison is incorrect about the ability to enforce recordkeeping violations via Section 167. *See* Def. Br. at 45. The text of the statute is clear that EPA can prevent construction or modification, but says nothing about recordkeeping requirements. Violations of those provisions instead are actionable under Section 113. 42 U.S.C. § 7413.

independently determines that NSR applies. In other words, EPA can enforce NSR against only those operators that have voluntarily entered the program, while powerless against those who avoid it. Such a reading makes Section 167 essentially meaningless.

3. *The Clean Air Act modification definition is consistent with enforceable pre-construction review.*

Sections 165 and 167 demonstrate that Congress created an enforceable, pre-construction NSR program. The only statutory support Detroit Edison claims for its contrary argument is the Clean Air Act modification definition, which applies to any project that "increases the amount" of pollution from the source. Def. Br. at 43 (citing 42 U.S.C. § 7411(a)(4)). As in its snippets from the 2002 Rules, Detroit Edison relies on the present tense verb "increases" as an implication that actual post-project pollution data, rather than projections, control applicability. That reading cannot stand because it would render Sections 165 and 167 inoperative, for the reasons described above. Courts have declined to give the verb tenses of Section 111(a)(4) any such power.

In hearing challenges to the 2002 Rules, the D.C. Circuit specifically interpreted Section 111(a)(4) as "requiring a causal link

between the *proposed* change and any post-change increase in emissions," demonstrating that the court saw the definition as consistent with pre-construction applicability. *See New York v. EPA*, 413 F.3d 3, 32-33 (D.C. Cir. 2005) (emphasis added) (citing 2002 Rules preamble, 67 Fed. Reg. at 80,203). Courts have regularly noted the language of the modification definition *and* the pre-construction nature of the permit requirement. *See, e.g., Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 567-68 (2007). Until now, no litigant has claimed that Section 111(a)(4) precluded pre-construction NSR applicability. *See* Pl. Br. at 29-30 (case law rejecting argument that only post-project actual data establishes liability).

Finally, the statutory modification definition comes from a preexisting Clean Air Act program called New Source Performance Standards created in 1970. In 1977, Congress adopted the same modification definition for NSR, while also passing the NSR-specific provisions requiring pre-construction review. Detroit Edison's inference based on the earlier definition's verb tense cannot overcome the specific, pre-construction requirements Congress crafted in passing NSR. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992)

("commonplace of statutory construction that the specific governs the general").

B. The NSR Case Law Confirms The Pre-Construction Requirement

As the Supreme Court's *Duke Energy* case illustrates, courts have long heard NSR enforcement cases based on EPA's analysis of what the operator should have expected before beginning a project. *Duke Energy* involved just the type of EPA analysis that Detroit Edison now says is impermissible: EPA showing the pollution increase that should have been expected at the time of construction. 549 U.S. at 571; *see also NPCA*, 480 F.3d at 414-415 (citizen suit case alleging failure to obtain pre-construction permit). This type of analysis has been accepted by each court to consider the issue before the decision below. *See* Pl. Br. at 29-30. Detroit Edison says these cases are "inapposite" because they involve earlier versions of the rules. Def. Br. at 47-49. However, these cases are instructive here for at least three reasons.

First, the cases stressed the requirements of the *statute*. For instance, the *Southern Indiana Gas and Electric* court concluded that basing liability solely on post-construction actual pollution would "'turn the preconstruction permitting program on its head and would allow

sources to construct without a permit while they wait to see if it would be proven that emissions would increase. *Clearly, Congress did not intend such an outcome, which would eviscerate the preconstruction dimension of the program.*'" *United States v. S. Ind. Gas & Elec. Co.*, No. IP99-1692 C-M/F, 2002 WL 1629817, at *2-3 & n.3 (S.D. Ind. July 18, 2002) (emphasis added) (quoting *In re: Tenn. Valley Authority*, No. CAA-2000-04-008, 2000 WL 1358648 (EAB Sept. 15, 2000), *rev'd on other grounds, Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236 (11th Cir. 2003)); *see also United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 881 (S.D. Ohio 2003). The statute has not changed, and the cases remain relevant to the 2002 Rules.[10]

Second, Detroit Edison simply ignores the prior case that *did* analyze the 2002 Rules. *Xcel Energy* involved violations of EPA's information-gathering authority, but the principle at issue was the

[10] Detroit Edison attempts to cast doubt on the case law by attacking the procedural aspects of the EPA Environmental Appeals Board ("EAB") decision cited by some of the cases. Def. Br. at 48. Critically, the EAB ruling was not reversed on the merits. Instead, the Eleventh Circuit found it was procedurally invalid, while leaving EPA the option of filing the same claims in federal court. *Whitman*, 336 F.3d at 1239; *NPCA*, 480 F.3d at 414. That decision does not change the fact that the EAB decision reflected EPA's understanding of NSR, or that several courts independently reached the same conclusion after their review of the law.

same as here. Xcel argued that EPA could not bring an NSR enforcement action before construction began, and that EPA thus lacked the authority to seek information before construction. The court there disagreed, finding that the Clean Air Act "*clearly* accords EPA the authority . . . to prevent through appropriate legal remedies, violations committed *before construction commences*." *United States v. Xcel Energy, Inc.*, 759 F. Supp. 2d 1106, 1113 (D. Minn. 2010) (emphasis added). *Xcel Energy* confirms the prior case law that EPA can enforce NSR violations based on pre-construction emissions projections alone, this time under the 2002 Rules.

Finally, the preexisting NSR case law reflects the regulatory backdrop against which EPA crafted the 2002 Rules. As EPA drafted and promulgated the 2002 Rules, the United States was also prosecuting cases against utilities based on allegations that they had failed to correctly project future pollution and thus evaded permitting requirements. EPA never said that changing the rules would end such enforcement cases. To the contrary, it stressed that the 2002 Rules made only "minor changes" for electric utilities like those in the

enforcement cases. 67 Fed. Reg. at 80,192. And indeed, the enforcement cases continued after 2002.

III. NSR Requires Enforceable Pre-Construction Review To Function As Congress Intended

The Clean Air Act and regulations compel what is common sense: a pre-construction permitting program cannot turn solely on post-construction data. Postponing applicability until after the project means each source gets at least one free year of increased pollution before losing its grandfathered status. Most troubling, it means some sources may attempt to avoid pollution controls altogether by temporarily managing their pollution to avoid NSR scrutiny. These outcomes cannot be reconciled with Congressional intent for NSR.

Detroit Edison admitted during discovery that it adjusts the price of Unit #2 to "manage" its pollution during the five-year monitoring period specified by 40 C.F.R. § 52.21(r)(6)(iii). Pl. Br. at 32-33. Detroit Edison seeks an interpretation of NSR where it can: (1) use a low-ball estimate of future pollution to completely renovate a plant without getting a permit beforehand and (2) temporarily manage pollution during the monitoring period to effectively avoid NSR scrutiny. Congress included the modification trigger in NSR to prevent precisely

this "indefinite immunity" for aging sources. *Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 909 (7th Cir. 1990) ("*WEPCo*").

Detroit Edison does not challenge the United States' description of the company's pollution management practices nor the potential for sources to evade NSR. Instead, it argues only that EPA anticipated that sources would manage their emissions to avoid pollution increases. Def. Br. at 53-55. Critically, however, EPA envisioned that sources might manage their emissions *within a system based on enforceable pre-construction review*. In such a system, as the Clean Air Act envisions, EPA can always require compliance with NSR based on its own analysis of pre-construction expectations, avoiding a situation where NSR is left entirely to the control of the operator. Without the potential for enforcement based on pre-construction estimates, operators could conduct perfunctory, self-serving pre-construction NSR analyses and then temporarily manipulate operations to limit pollution afterward and avoid NSR scrutiny, achieving the "indefinite immunity" Congress sought to eliminate. *WEPCo*, 893 F.2d at 909.

The facts here illustrate the problem. Detroit Edison itself projected pollution increases 100 times larger than the relevant

thresholds. Pl. Br. at 13. This projection would require a permit – even in the company's view of NSR – except that it claimed the entire increase was unrelated to the project. Pl. Br. at 13-14. That is, the company expected to (i) spend $65 million to replace major components that were causing unit downtime and (ii) run more and pollute more after the overhaul, but said the two were completely unrelated. Under the company's view of the law, all it needed to do was say the power plant "extreme makeover" had no effect on operations, and it earned a free pass from pre-construction permitting and immunized its legal conclusions from judicial review.

Detroit Edison's free pass has dire consequences. Modern pollution controls at Monroe Unit #2 would reduce pollution by at least 90% – eliminating more than 25,000 tons of sulfur dioxide and 7,000 tons of oxides of nitrogen each year. Dkt. #8, Ex. 1 at ¶6. Most important, they would save lives: each year without the controls costs nearly 100 lives and more than $500 million in harm to society. Pl. Br. at 16.

Pre-construction applicability is too critical to NSR to leave solely to the discretion of the sources. The Seventh Circuit made clear in

WEPCo that EPA "cannot reasonably rely on a utility's own unenforceable estimate of its annual emissions." *WEPCo*, 893 F.2d at 917. Yet that it precisely what Detroit Edison advocates here as the exclusive form of pre-construction applicability. Making sources like Monroe Unit #2 comply with NSR *after* pollution actually increases comes too late to satisfy the statutory purpose of analyzing and controlling pollution increases before they occur. *See NPCA,* 480 F.3d at 412.

CONCLUSION

This court should reverse the grant of summary judgment and remand for trial on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,761 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because I prepared it in a proportionally spaced typeface using the Microsoft Word 2007 word processing program in 14-point Century Schoolbook type.

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